Sup. 248.

Brief of Harlock for P. E. (or

No. 594.

Filed April 9, 1898.

Supreme Court of the United States.

MAUDE E. KIMBALL,
Plaintiff in Error,

vs.

HARRIET A. KIMBALL, JOHN S. JAMES AND HARRIET I. JAMES,
Defendants in Error.

Brief for Plaintiff in Error in Opposition to Motion to Dismiss Writ of Error, and Papers in Opposition to said Motion.

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In the Supreme Court of the United States.

MAUDE E. KIMBALL, Plaintiff in Error, *against* HARRIET A. KIMBALL, HARRIET I. JAMES and JOHN S. JAMES, Defendants in Error.	No. 594.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR.

On November 9, 1896, one Edward C. Kimball died in the City of Brooklyn, County of Kings and State of New York.

On the 10th day of November, 1896, Harriet A. Kimball, defendant in error, mother of the decedent, applied to the Surrogate of said County of Kings for letters of administration upon the estate of the decedent, she alleging that he died intestate, and that he was unmarried and left him surviving no widow. Thereupon the Surrogate issued letters of administration upon the decedent's estate to said Harriet A. Kimball, mother of decedent, and to one John S. James. Thereafter the plaintiff in error brought a proceeding by petition to said Surrogate to revoke said letters of administration, and to obtain such letters for herself on the ground that she was the lawful widow of decedent. The defendants in error appeared and opposed this application of plaintiff in error, alleging that she was not the widow of decedent, because she had married one John L. Semon before the ceremony of mar-

riage between her and the decedent, and that although a decree of divorce had been granted to her by a Court of the State of North Dakota five years before such ceremony of marriage with decedent, the said decree was void because the said Semon was a resident of the State of New York, and was not served with process in the State of North Dakota, and did not appear in the action, and that the decree of the North Dakota Court recited that the same was granted upon the default of said Semon. (See Printed Record, p. 12.)

To this the plaintiff in error responded by showing that before she began the proceeding to vacate the letters of administration and to obtain such letters for herself as widow, the Court of North Dakota had duly amended its decree in the divorce action *nunc pro tunc* as of the date of the original decree, by striking therefrom the recital that the defendant Semon had not appeared or answered therein, and by reciting in lieu thereof that the said Semon had duly appeared and answered and submitted himself to the jurisdiction of the Court. (See Printed Record, p. 28.)

A trial of the issues thus joined was had before the Surrogate and substantially all that was introduced in evidence by both sides was the record of the North Dakota action. (See Printed Record, p. 45.)

By that record it appeared that the amendment *nunc pro tunc*, as aforesaid (see pp. 32 and 41, Printed Record), was granted by the North Dakota Court upon proof that immediately after service upon him in New York of the summons and complaint in the divorce action said Semon sent to the plaintiff's attorneys therein a paper signed and sworn to by him controverting *seriatim* the allegations of the complaint, a copy of which paper was produced. (See pages 36, 39, Printed Record.) That this paper was so sent was in no wise controverted in this proceeding or elsewhere.

The Surrogate found, in direct conflict with the judgment of the North Dakota Court, that the paper so sent

did not constitute an appearance or answer, and he placed among his findings of fact a finding that the said Semon did not appear in the action, and he held the North Dakota decree void for such non-appearance and, therefore, the plaintiff in error was not legally divorced from the said Semon at the time of the ceremony of marriage between her and the decedent. The Surrogate thereupon made a final decree declaring that plaintiff in error was not the widow of decedent and not entitled to letters of administration upon his estate. (See Printed Record, pp. 57, 58.) The statutes of New York give to the widow of an intestate the absolute right to letters of administration upon the personal estate of her deceased husband. Appeals were prosecuted from the decree through the State Courts, where the decree was in each instance affirmed, whereupon plaintiff in error sued out a writ of error which it is now sought by the defendants in error to dismiss by reason of certain matters not appearing in the record, but for the first time called to the attention of any Court by the papers on this motion. These matters are as follows:

After this decree was entered an alleged will of the decedent was found, and the same was admitted to probate in exactly the same manner as were the letters of administration aforesaid granted, to wit, upon a petition filed by two of the defendants in error in which they alleged, as before, that the decedent left him surviving no widow. The statutes of New York prescribe that citation *must be issued to the widow of a decedent* upon an application to probate an instrument propounded as his last will and testament.

Upon learning of these proceedings upon probate, had without notice to plaintiff in error, counsel for plaintiff in error suggested to counsel for defendants in error the propriety of vacating by consent the decree of the Surrogate aforesaid adjudging plaintiff in error not to be the widow of the decedent so that some other action, suit or proceeding might be brought to test the question of widowhood without the danger to plaintiff in error of having

the decree aforesaid used against her as *res adjudicata* and as forever settling the question of her widowhood. Counsel for defendant in error, however, refused to consent to vacate said decree. They, of their own motion and *ex parte*, had caused to be revoked the letters of administration issued to the defendants in error, but would go no further (see Affidavit of W. Harlock, p. 32 of this Brief).

Plaintiff in error was therefore compelled to appeal in order to get rid of the adjudication that she was not the widow. And thereupon counsel for defendants in error suggested to counsel for plaintiff in error that a motion would be made to dismiss the appeal on the ground of the discovery and probate of a will and the consequent effect upon proceedings for letters of administration; but, after hearing the views of counsel for plaintiff in error as to the effect of the Surrogate's decree upon the question of widowhood in any other suit or proceeding which might be brought, counsel for defendants in error refrained from making such motion and the appeal was heard on its merits. (See affidavit of W. Harlock, p. 32 of this Brief.) The Surrogate's decree was affirmed on appeal both by the Supreme Court and the Court of Appeals of New York and judgments of affirmance and for costs amounting to two hundred and nine and 37/100 dollars have been entered against the plaintiff in error therein. (See Printed Record, pp. 67, 68 and 75).

No motion to dismiss was made in any of the State Courts, although ample opportunities therefor existed, and no suggestion of the facts now relied on to dismiss the writ of error was made therein.

The estate of the decedent consists of real estate in which plaintiff in error claims dower and also in a small amount of personal property, part of the proceeds of which under the laws of New York goes to the plaintiff in error if she is adjudged to be the widow of the decedent. But the principal object of the parties to this suit is to obtain certain insurance money amounting to eight

thousand dollars which by the terms of the contract of insurance is payable to the widow, if any, of the decedent, or, if there be no widow, then to his next of kin, to wit; the defendants in error. The contract of insurance provides as follows: "In all cases a certified copy of the "proceedings before a Surrogate or Judge of Pro- "bate may be accepted as proof of the matters therein "contained and if accepted shall protect the Association "in acting thereon and the Association shall forever "be released from all further claims or liability what- "soever." (See answer, p. 28 of this Brief.) A certified copy of the decree of the Surrogate aforesaid adjudging plaintiff in error not to be the widow of decedent is, therefore, now within the reach of the defendants in error and the insurer. The latter may upon the strength of a certified copy of the Surrogate's decree sought to be reversed in this Court, turn over the eight thousand dollars to the defendants in error, relying upon the adjudication in the decree that plaintiff in error is not the widow. The result would have happened before this but for the kindness of the officers of the Consolidated Stock and Petroleum Exchange, the insurer, who have promised plaintiff in error to await the result of this appeal to the Supreme Court of the United States before paying over the money. If this motion is granted, there will be nothing to prevent payment of the fund to the defendants in error.

If other proceedings had been begun by plaintiff in error after the discovery and probate of the alleged will, whether a suit against the insurer or a suit for dower in the lands, the same question of the validity of the divorce would have arisen and would eventually have reached this Court, unless the question of *res adjudicata* by the present decree bars all further litigation.

After having permitted the Courts of New York to pass upon the question of widowhood, and after those Courts have declared the North Dakota divorce to be void, it comes with ill grace from the defendants in error to now

seek to prevent the further review of the question of the validity of that divorce given by the Constitution of the United States and to seek to compel us to begin *de novo* a litigation in which, because of the law as expounded by the Courts of New York in the case at bar and of the opinions of the State Courts therein, plaintiff in error is bound to be beaten even if the matter is not considered *res adjudicata*, until finally she comes again to this Court to ask a reversal upon the ground that the Courts of New York have not given to the judgment of the Court of North Dakota that full faith and credit commanded by the Constitution of the United States.

POINT FIRST.

Plaintiff in error challenges the right of defendants in error to import into this case at the present time, and under the circumstances shown, the matters not appearing in the printed transcript of record and not brought to the attention of the Courts below, which they now allege for the purpose of dismissing this writ of error.

POINT SECOND.

The plaintiff in error is bound by the adjudication in the decree appealed from that she is not the widow of the intestate, and her only remaining remedy is by review in this Court.

Section 2260 of the New York Code quoted in full at top of page 6 of the brief of the defendants in error shows

that "Administration in case of intestacy *must be granted* " * * first, to the surviving husband or widow."

In order to deny letters of administration to the plaintiff in error it was, therefore, *absolutely* necessary, and was not a mere *incident*, as claimed by defendants in error, for the Surrogate to adjudicate *as he did* as follows: "It is ordered, adjudged and decreed that the petitioner, "*the said Maude E. Kimball is not the widow of Ed-*" *ward C. Kimball, deceased, and is not entitled as his* " *widow to letters of administration* of the goods, chat-" tels and credits which were of said Edward C. Kimball, " deceased" (page 58, Printed Record).

When this decree of the Surrogate was affirmed by the Supreme Court the order of affirmance described the decree in these words only, to wit: "A decree of the Surrogate's Court of the County of Kings made on the eighth " day of March, 1897, ordering, adjudging and decreeing " *that the petitioner* (Maude E. Kimball, plaintiff in error) " *is not the widow of Edward C. Kimball, deceased*" (Printed Record, page 67).

This adjudication in a legal proceeding, to which the next of kin of the decedent were parties on one side and the plaintiff in error, claiming to be the widow of the decedent, was the party on the other side, was in fact brought for the purpose of determining the question of widowhood. The right to letters of administration is a mere incident which attaches to widowhood when proved.

The decisions are unanimous that a prior adjudication is binding in all subsequent actions or proceedings between the same parties *as to all questions necessarily involved in the prior adjudication.* We think it is plain that the question of widowhood was the basis of and was necessarily involved in and decided by the Surrogate's decree, and that the decree that she is not the widow is binding upon plaintiff in error unless reversed by this Court. In any other action or proceeding between her and the de-

fendants in error she will be barred from asserting her widowhood.

New Orleans *vs.* Citizens' Bank, 167 U. S., 371.
Doty *vs.* Brown, 4 N. Y., 71.
White *vs.* Coatsworth, 6 N. Y., 137.
Castle *vs.* Noyes, 14 N. Y., 329.
Brown *vs.* Mayor of N. Y., 66 N. Y., 385.
Parry *vs.* Dickinson, 85 N. Y., 345.
Tuska *vs.* O'Brien, 68 N. Y., 446.

Therefore the plaintiff in error could never succeed in any action for dower or in an action to recover her share of the personalty of the decedent.

That the defendants in error considered the question of widowhood to be the real gist of the litigation is shown by their printed points in their brief on appeal, presented after the finding and probate of the alleged will, quoted *in hac verba* in the affidavit of W. Harlock on this motion, wherein they claim, 1st. That if plaintiff in error is not the widow, then she is not entitled to letters of administration; 2d. That she is not such widow if, when she married Kimball, she had not been divorced from her first husband; 3d. That she had not been lawfully divorced from her first husband. (See affidavit of W. Harlock, p. 32 of this Brief.)

The finding of a will, while it affects and renders unimportant the question of administration, in no way affects the question of widowhood, nor does it affect the validity of the adjudication made that the plaintiff in error is not the widow. Defendants in error were so well satisfied of this that they refused to consent to vacate that adjudication after the finding of the will. (See affidavit of W. Harlock, p. 32 of this Brief.)

They evidently well knew that in case plaintiff in error should bring an action for dower, that adjudication would bind her and be conclusive on the question of widowhood. They also evidently knew that the adjudication, unless reversed by the appellate tribunals of New York or by

this Honorable Court, would justify the Consolidated Exchange in paying the insurance money to defendants in error as next of kin. The proceeding in which this adjudication of the Surrogate was made under the laws of New York a special proceeding, and the decree is a final decree which terminates the same, and the same must be appealed from as in other cases of final decree. This is not the case of an interlocutory decree or order made in the course of a proceeding for administering the estate of the decedent.

With the entry of a decree for letters of administration and issue of such letters the Surrogate has no further jurisdiction except to revoke the letters in a proper case. His jurisdiction to distribute the estate can only be invoked in a new proceeding showing jurisdictional facts and such proceeding is entirely unrelated to the administration.

The defendants in error do not claim that this was not a final decree. In fact they urged that it was such final decree and caused the appeal to be heard in advance as a preferred cause in the New York Court of Appeals by reason of being such final decree (see affidavit of Mr. Harlock, p. 33 of this Brief).

That the proceeding was what is styled, in New York practice, a "special proceeding" to distinguish it from "an action." See

Libbey *vs.* Mason, 112 N. Y., 525, and Secs. 3333, 3334 N. Y. Code of Civil Procedure.

Sec. 2550 of said Code denominates the final determination of the rights of the parties to a special proceeding a "final order or decree." Sec. 2570 of said Code provides for appeals from decrees in special proceedings.

POINT THIRD.

The defendants in error have been guilty of laches in relation to the dismissal of the appeal herein.

The defendants in error have estopped themselves to assert that there is no practical question left in this case because of the finding and probate of the will not only by their refusal to consent to vacate the decree thereafter, but by arguing the appeals in the Courts of New York on the merits and promoting these appeals after knowledge of the facts on their part and without in any manner moving to dismiss the appeals upon the grounds now sought to be availed of here to dismiss this writ of error. Costs have been incurred and plaintiff in error has been charged therewith in judgment, on motion of defendants in error, to the amount of two hundred and nine and 31/100 dollars since the finding and probate of the will (see affidavit of Mr. Harlock, p. 34 of this Brief). If *defendants in error* had made the motion as soon as an appeal was taken from the Surrogate's decree their procedure would have been less open to criticism than is the present motion made after such a lapse of time and change of conditions and after all the Courts of New York have construed the North Dakota divorce in such a manner as would defeat plaintiff in error, irrespective of the question of *res adjudicata*, in every other action or proceeding which she may ever bring until she can again reach this Court by writ of error raising the question now raised here.

POINT FOURTH.

There was no ground upon which plaintiff in error could have succeeded in vacating the decree of the Surrogate adjudging her not to be the widow.

The finding of a will, as shown above, did not make the plaintiff any more or less the widow of decedent than she was before.

There was no "newly discovered evidence" going to the question of widowhood. Both parties had had their day in Court on the question of widowhood, and the defendants in error were unwilling to consent to vacate the decree in their favor and they refused to do so (see affidavit of Mr. Harlock, p. 32 of this Brief). The decree adjudged that plaintiff in error was not the widow, and was not entitled to letters of administration as widow. The subsequent finding of a will did not affect either her widowhood or the fact that she was not entitled to administration. Its only effect was to show that *no one* was entitled to administration; it could not affect the Surrogate's decree to show that plaintiff in error was not entitled to letters *for a reason not known originally*. The section of the Code of New York quoted by defendants in error to show power of the Surrogate to vacate his decree (Section 2481, Code of Civil Procedure) leaves it in the discretion of the Surrogate, who must exercise the power "only in a like case and in the same manner as a Court of "record and of general jurisdiction exercises the same "powers." Here the same Surrogate, after making the decree above mentioned, granted in a subsequent proceeding, upon an allegation of defendants in error that a will had been found and *that the decedent had left no widow*, a decree probating the alleged will without notice to

plaintiff in error, although the Statute provides that on the propounding of a will *the widow must be cited.*

See New York Code of Procedure, Sec. 2615, which prescribes that on a petition for probate the widow of the testator "*must be cited.*"

If the Surrogate had been asked to vacate his prior decree, it would have been opposed by defendants in error, who had refused to consent to its revocation, and who would, no doubt, have claimed that we had had our day in Court on the question of widowhood, and that if the decree were vacated it would enable us to attack the probate proceedings and there again assert the right to be heard as widow. Counsel for plaintiff in error saw then, and see now, no reason for believing that the Surrogate, who had considered the case in all its aspects, would have vacated the decree herein in the absence of the consent of defendants in error. The only effect of such action on the part of the Surrogate would have been to compel this plaintiff in error to move to vacate the probate of the will, on the ground that she was the widow and entitled as a matter of right to be cited and made a party to the probate proceedings. This would have again brought before the Surrogate the question of widowhood which he had already decided in a proceeding between the same parties.

Again, the plaintiff in error would gladly, after the adverse decision of the Surrogate, have vacated the decree and resorted to another tribunal and tested the question either by action for dower or by action against the insurer, but the defendants in error refused to consent, and thus in the opinion of counsel for plaintiff in error compelled this appeal.

It is rather late in the day for the defendants in error to suggest that we might have been relieved from the binding effect of this decree when any suggestion of that sort might have availed us, if made in the early stages of this litigation, whereas now it is only made for the purpose of embarrassing us on this motion.

POINT FIFTH.

The fact that the Surrogate has admitted the will to probate has no bearing on the questions here.

The probate was had without notice to plaintiff in error and was made upon a petition of Harriet A. Kimball, the mother, in which she alleged that *the decedent left him surviving no widow.*

The widow, if there be one, must be cited to show cause why a paper propounded as the will of her husband should not be admitted to probate.

N. Y. Code of Civil Procedure, Section 2615.

It is provided by the said Code, Section 2626, that the probate of a will shall be binding only when the proceedings are "in accordance with the provisions of this article" of the Code, one of which provisions is the citation of the widow, if there be one.

The will here is a will of both real and personal property—hence Section 2627 of said Code applies. That section provides that "a decree admitting to probate a will "of real property made as prescribed in this article estab- "lishes presumptively only all the matters determined "by the Surrogate pursuant to this article *as against a* "*party who was duly cited*, or a person claiming from, "through or under him."

It is plain, therefore, that the defendants in error are begging the question when they claim that plaintiff in error cannot attack the probate collaterally.

If she is the widow, she is not bound because she was not a party to that proceeding.

POINT SIXTH.

There remains in this case, in spite of the subsequent finding and probate of an alleged will, the following very practical results and substantial reasons for denying the present motion:

1st. A binding adjudication that plaintiff in error is not the widow of the decedent, which adjudication will defeat any action she may bring for dower or for the insurance on the life of her late husband. (See Point First, *supra*, and affidavit of W. Harlock, p. 34 of this Brief.)

2d. Outstanding judgments against plaintiff in error for costs of the proceeding amounting to two hundred and nine and 37/100 dollars.

Besides this it would be unjust to grant the motion because:

3d. There is an estoppel by laches and acquiescence of the defendants in error, who have argued the appeals below on the merits, and who cannot now claim that there is no practical question in this litigation.

4th. Irrespective of the question of *res adjudicata*, the Courts of New York by reason of their decisions in this case will necessarily hold the North Dakota divorce invalid in any subsequent litigation to the great disadvantage of plaintiff in error, until she again reaches this Court.

5th. A certified copy of the decree herein that plaintiff in error is not the widow of the decedent is by the contract of insurance a complete protection to the insurer in case of payment of the insurance money to the defendants in error as next of kin on the ground that there is no widow. (See Answer, p. 28 of this Brief. See also pages 4 and 5 *supra*.)

6th. The defendants in error have refused on request to consent to the revocation of the decree herein against us. (See affidavit of W. Harlock, on p. 32 of this Brief.)

7th. Plaintiff in error would be forever deprived of an opportunity of reaching this Court on the merits of her case, and of presenting for its determination the question whether or not full faith and credit has been given by the Courts of New York to the judgment of the North Dakota Court divorcing her from her first husband if the Courts of New York should hold the decree here to be *res adjudicata*, as they undoubtedly would hold in any subsequent action.

8th. Because the suggestion that the Surrogate would have revoked the decree appealed from on our application is speculative and without merit.

POINT SEVENTH.

There is a Federal question involved in this case, to wit: Was full faith and credit given by the Courts of New York to the judgment of the Court of North Dakota divorcing the plaintiff in error from her first husband, James L. Semon?

The whole litigation depends upon the primary question: Is plaintiff in error the widow of the decedent?

Having entered into a prior marriage with one James L. Semon, plaintiff in error was not legally married to the decedent unless she was previously legally divorced from Semon.

The Court of the State of North Dakota had granted her a decree of divorce which the defendants in error assert was not binding outside of the State of North Dakota because, as they allege, the defendant Semon was not served with process within the State of North Dakota, and did not appear in the action.

Whether Semon did or did not appear in the action was the sole question raised, and upon which the solution of the question of widowhood depends.

There was no disputed question of fact below. Both parties relied entirely upon the records of the Court of North Dakota. Those records showed the following facts appertaining to the question of appearance:

When the decree of divorce was first made it recited that the defendant Semon, who was served with process outside of the State, failed to appear or answer in the action and the decree proceeded as upon default of defendant.

Subsequently, however, and before plaintiff in error commenced the proceeding before the Surrogate there was presented to the North Dakota Court a petition by Semon stating that on receipt of the process and pleading he had written an answer thereto and sworn to the same before a Notary Public and in accordance with the directions in the summons he had mailed the same to the attorneys for the plaintiff in the divorce action, intending thereby to deny the charges against himself and in the belief that in view thereof the Court would not grant a divorce against him. Plaintiff's attorneys admitted the due receipt by them of this paper and a copy of it was presented to the North Dakota Court. This paper took up and answered seriatim the charges in the complaint. Plaintiff's attorney informed the North Dakota Court that because of formal defects he treated this paper as a nullity and proceeded as in case of default. Semon, who did not learn of the divorce decree until about the date of his petition, asked the Court to amend the decree so as to recite his appearance by virtue of the aforesaid, he being advised that under the laws of New York he could not marry again if the decree was had on his default; while on the other hand the plaintiff was freed thereby and had actually married again. (See Printed Record, p. 36.) The Court of North Dakota thereupon, upon notice to plaintiff in error, amended its decree *nunc pro tunc* as of the date of the original decree by striking therefrom the recitals of defendant's default to appear and inserting in lieu thereof a recital that defendant Semon duly appeared therein. (See Printed Record, pp. 32 & 41.)

The Surrogate in his opinion treated the question raised by this record as a question of law as it, in fact, is. But he placed among his findings of fact the statement that Semon did not appear in the divorce action. The appellate courts upheld the Surrogate solely on the ground that this finding of fact was conclusive upon them, as they had the power to review questions of law only and not questions of fact. In the Court of Appeals Chief Justice Parker in a dissenting opinion in favor of the plaintiff in error vigorously combated this disposition of the case and claimed that the facts were undisputed and that there was involved only a question of law; Chief Justice Parker (Printed Record, pp. 86 to 89) said, among other things:

"The command of the Constitution of the United "States, that 'full faith and credit shall be given in "each State to the public acts, records and judicial "proceedings of every other State,' seems to call for "a reversal of the order appealed from.

* * * * *

"The record presents an amended decree in that ac- "tion which was in existence at the time these proceed- "ings were instituted, and upon the subject of the de- "fendant's appearance the recital therein is as follows: "'The defendant having appeared herein and answered "and submitted himself to to the jurisdictien of the "court.' When this amended decree was put in evi- "dence, therefore, it was established presumptively "that the court making the decree had acquired juris- "diction over the defendant by his appearance therein. "It was a presumption rebuttable by proper evidence, "if such existed, but in the absence of evidence tend- "ing to disprove the assertion of the decree that the "defendant had appeared and answered and submitted "himself to the jurisdiction of the court, it was conclu- "sive. It was not attacked by evidence; indeed, there "was no evidence in the surrogate's court upon the "subject except the papers which were submitted to the

" Dakota court on the motion made by the defendant " Semon to amend the decree in respect to the recital " referred to. If the judgment, when first entered, had " been in the form in which it now is, as respects the " recital, no one would have thought of challenging it, " certainly not without direct evidence in possession of " the attacking party tending to show that there was " no appearance. But the motion to amend the judg- " ment, made by the defendant in that action after the " death of the intestate, Kimball, seems to have aroused " suspicion that there was some collusion between " Semon and his former wife and that his action was " taken for her benefit, and not for his own, as he " swears. There is, however, no proof that this sus- " picion is well founded, but if it were otherwise it " could not affect *the question before us, which is* " *whether the Dakota court had before it competent* " *evidence upon which to base the determination that* " *it had jurisdiction of the defendant Semon at the* " *time of the entry of the judgment, and authority to* " *amend the decree as of that date, so that it should* " *show such jurisdiction. The evidence upon which* " *the court based its decision allowing the amendment* " *is before us, and it cannot be said that it does not* " *furnish support for the determination of the court.*

" The defendant Semon, who undertook to answer in " that action within the time mentioned in the summons " and subsequently insisted upon such an amendment " of the decree as should recite the fact of his submis- " sion to the jurisdiction of the court, does not chal- " lenge its jurisdiction. That is attempted by a third " party, who produces no other evidence than that " submitted by Semon to the court in his petition pray- " ing for such an amendment as should recite the " jurisdictional facts which existed when the decree " was first made. No prior case can be found where it " has been held that in such a situation an adjudication " of personal appearance can be disregarded, when col-

" laterally attacked by a third party, and the court, of " its own head, held otherwise.

* * * * *

" The letter which Semon insists was his answer and " so intended, was verified, not in the precise form " provided by our statute for the verification of plead- " ings, but nevertheless it declared that it was 'ab- " solutely true in every particular.' The district court " of North Dakota held that it constituted a proper " appearance and answer, ordered it to be filed as such " and amended the decree *nunc pro tunc*, so as to re- " cite the appearance of the defendant. The authority " to grant the amendment was conferred by section " 4938 of the Code of North Dakota, which provides " that 'the court may before or after judgment, in " furtherance of justice, on such terms as may be " proper, amend any pleading, process or proceeding " by adding or striking out the name of any party, " or by correcting a mistake in the name of a party " or a mistake in any other respect, or by inserting " other allegations material to the case, or when the " amendment does not change substantially the claim " or defense by conforming the pleading or proceeding " to the facts proved.' It will be observed that this " section is substantially in the language of section 723 " of our Code of Civil Procedure.

" In granting the order to amend the decree *nunc* " *pro tunc* upon the motion of the defendant in the " action, the court necessarily decided what the evidence " before it asserted, viz., that the jurisdictional facts " existed at the time the original decree was entered. " The motion papers tend to show that such was the " fact. It was not then disputed, nor has it since been " questioned by evidence. The court having reached " the conclusion that the recital in the original decree " did not state the truth, but was a mistake, had the " authority to amend the decree as of the date when " it was first entered so that it should recite the ap-

" pearance of the defendant. Authority to do so was
" expressly conferred upon it by the Dakota statute,
" which, as we have already observed, is substantially
" the same as our own.

" Upon the facts stated would any one question the
" power of a court of original jurisdiction in this State
" to grant such an amendment? If granted, would
" the suggestion be entertained that the judgment
" could be attacked collaterally without other evidence
" than that upon which the court based its determina-
" tion? Certainly not. And it should not be forgotten
" that it is our duty to give the same force and effect
" to this determination of our sister State that we would
" give to it were it made by our own courts.

" It is suggested that the learned surrogate's court
" found as a fact that there was no appearance by
" the defendant Semon in that action and that we are
" concluded by his finding. The surrogate found the
" facts to which I have already referred, and because
" he saw fit to insert among his findings of fact his
" conclusion of law that the defendant did not appear,
" does not deny to us the right, nor relieve us from
" the duty, of determining what conclusion of law the
" facts really demanded.

" I advise a reversal of the order."

POINT EIGHTH.

Even if Semon never appeared or answered in the divorce action there remains a Federal question, to wit:

The North Dakota Court having jurisdiction of the person of plaintiff in error and of the subject matter of the action, to wit, the status of plaintiff in error, has, by proceedings in the nature of proceedings *in rem*, adjudicated that plaintiff in error be divorced from defendant

Semon and has declared her to be a single woman. Marriage is a status, citizenship is a status, infancy or minority is a status. Each State has absolutely jurisdiction to determine the status of its residents.

This Honorable Court will be called upon in this case to decide, in case they hold that Semon's appearance was improperly recited in the North Dakota decree, whether or not full faith and credit was given to the decree in its original form. The inquiry then would divide itself into two questions: 1st, Whether the plaintiff in error, under the provisions of the Constitution of the United States, can, by decree of a North Dakota Court having jurisdiction of her person, be declared to be divorced, and by a subsequent decree of the Courts of New York be declared to be still married and the wife of the person from whom she was divorced by the North Dakota Court. 2d. Can third persons attack collaterally a decree of divorce granted in another State when both of the parties to the divorce are living and both acquiesce in such decree.

Cheever *vs.* Wilson, 9 Wall., 108.
Pennoyer *vs.* Neff, 95 U. S., 714.
Cooley on Cons. Lien, 400.
2 Bishop on Marriage & D., Sec. 150 *et seq.*

Without arguing these questions at this time, we may refer to "Bishop on Marriage and Divorce," who states this constitutional question substantially as follows:

> The wife having obtained in North Dakota a divorce from her former husband residing in New York, the New York Courts, by force of the Constitution of the United States, are not permitted to say that her status has been reduced to non-marital *as to North Dakota*, but it remains marital *as to New York*. If the effect of the sentence is, in North Dakota, to make her a single woman there, its effect is also, and equally, and to exactly the same extent, to make her a single woman in New York. And such she is made in all the other States in the Union. The

North Dakota decree relieved her of her marital status. To deny the validity of that proceeding, where in the conduct of the cause the only possible citation had been given to the husband in New York, would be to attempt an interference with the Government of North Dakota in its own dominion, by deny. ing its authority to fix the status of its own resident citizens.

2 Bish. Mar. & Div., Sec. 187.

The tribunals of every civilized country hold a woman who has no husband to be a single woman. In this case the wife had no husband; for the North Dakota Court, by whose decision, so far as her status is concerned, the New York Courts must acknowledge themseves to be bound, had reduced her status to that of a single woman. Marriage is a status, and the severance of either party from the combination terminates the status. This principle is oftenest illustrated in the death of a married party. No one ever pretended that when a husband or wife is dead the other remains married. A thing which can exist only in pairs cannot continue its existence after one of the two constituents is removed.

The petitioner being freed from her marital relations with her former husband, had a perfect right to marry again anywhere, as if her former husband were actually dead.

POINT NINTH.

The motion to dismiss the writ of error should, therefore, be denied with costs.

WALDEGRAVE HARLOCK,
GEORGE BELL,
Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES. 1

MAUDE E. KIMBALL,
Plaintiff in Error,

against

HARRIET A. KINBALL, HARRIET I. JAMES and JOHN S. JAMES,
Defendants in Error.

No. 594.
Answer.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States: 2

MAUDE E. KIMBALL, plaintiff in error herein, for her answer to the petition of Harriet A. Kimball, Harriet I. James and John S. James, the defendants in error herein, dated and verified March 17th, 1898, praying that the writ of error allowed herein be dismissed with costs, or that the order of the Court of Appeals of the State of New York be affirmed with costs, and for other relief, respectfully shows to this Honorable Court, as follows:

I.—The plaintiff in error claims to be the lawful widow of Edward C. Kimball, deceased, and as such widow instituted a proceeding by petition in the Surrogate's 3
Court in the County of Kings, in the State of New York, to vacate letters of administration issued by said Surrogate upon the estate of decedent without notice to this plaintiff in error, and in disregard of her rights as widow, and to have such letters of administration awarded to her. The printed record, pages 2, 3 and 4, contains the petition of plaintiff in error aforesaid.

II.—The defendants in error answered said petition, and by their answer alleged, among other things, that while there had been a ceremonial marriage between the

plaintiff in error and the decedent, nevertheless, that prior thereto the plaintiff in error and one James L. Semon intermarried in the City of New York, and that thereafter the plaintiff in error commenced an action in a Court of the State of North Dakota against said James L. Semon for a divorce, and that upon his default to appear or answer, said Court adjudged and decreed that the bonds of matrimony entered into between plaintiff in error and said James L. Semon be dissolved, and the said parties and each of them absolutely released from the bonds of matrimony; and said answer averred that said decree of divorce was and is absolutely null and void in the State of New York, and that the subsequent marriage between the plaintiff in error and the said Edward C. Kimball was absolutely null and void by reason of the invalidity of the decree of divorce aforesaid. The printed record, pages 12 and 13, contains the answer aforesaid.

III.—The plaintiff in error replied to said answer, alleging that *in truth and in fact* said James L. Semon appeared and answered in said action for divorce in the Court of North Dakota aforesaid, and that while the decree therein as originally entered recited the default of said James L. Semon to appear or answer, nevertheless, the record and decree in said divorce action were duly amended by said Court of North Dakota *nunc pro tunc* as of the date of the original decree so as to recite such appearance and answer of the said James L. Semon, and that such amendment was duly made before the commencement of the proceeding by the plaintiff in error as aforesaid. The printed record, at pages 28, 29 and 30, contains the reply of plaintiff in error aforesaid.

IV.—That upon the pleadings aforesaid the parties went to trial before said Surrogate, the defendants in error first putting in evidence the decree and proceedings in the divorce action as the same were before the amendment, and the plaintiff in error thereupon putting in evidence the decree and proceedings in the divorce action as

amended *nunc pro tunc*. The printed record, at page 45 7
et seq., contains the proceedings upon the trial before the Surrogate.

V.—Thereupon the Surrogate made a decree duly entered on the 8th day of March, 1897, whereby he adjudged and decreed that the plaintiff in error, "Maude E. Kim-"ball, is not the widow of Edward C. Kimball, deceased, "and is not entitled as his widow to letters of adminis-"tration of the goods, chattels and credits which were of "said Edward C. Kimball, deceased," and dismissing the petition of plaintiff in error. The printed record, at pages 57 and 58, contains the decree aforesaid.

8

VI.—That by the statutes and laws of the State of New York a widow is entitled absolutely and as a matter of right to administer upon the personal estate of her husband dying intestate, and is entitled, as a matter of right, to letters of administration upon the estate of such deceased husband. That the statutes and laws of the State of New York provide that the proceeding for the determination of the right of any person to letters of administration upon the estate of a decedent is a special proceeding, and that the decree therein made is a final decree and closes the proceeding, and that the only remedy for a dissatisfied party is by appeal from such decree within the time allowed by law for appeals from final judgments and 9
decrees.

VII.—Upon information and belief, that after the making of the decree aforesaid, and on or about the 25th day of March, 1897, attorneys for the defendants in error wrote to W. Harlock, Esq., attorney for plaintiff in error, the letter annexed to the petition to dismiss the writ of error wherein they allege that a last will and testament of the decedent was found on the 23d inst. and was admitted to probate by the Surrogate of Kings County on the 25th day of March, 1897, and that said Surrogate had revoked the letters of administration issued by him as aforesaid on

10 November 10th, 1896, to the defendants in error, and in lieu thereof had issued letters testamentary to two of the defendants in error, to wit, Harriet A. Kimball and Harriet I. James.

That all of the proceedings referred to in the letter aforesaid were had, if at all, without any notice to plaintiff in error until the letter aforesaid, and without making the plaintiff in error a party to such proceedings. That by the statutes and laws of the State of New York the widow of a decedent is entitled to be cited upon the proceedings for the probate of an alleged last will and testament of her husband, but that no citation was issued to the plaintiff in error upon the probate of the alleged will
11 as aforesaid, but on the contrary, as appears by the petition to dismiss the writ of error herein, the defendants in error, Harriet A. Kimball and Harriet I. James, prevented the issue of a citation to plaintiff in error in said proceeding by alleging in their petition for the probate of the alleged will "that said deceased left him surviving no widow." That by reason of the aforesaid, the adjudication upon the probate of said alleged last will and the probate thereof are not binding upon the plaintiff in error, and she may attack the same collaterally or directly. That long prior to March 25, 1897, oral notice of the intention of plaintiff in error to appeal from the decree of the Surrogate adjudg-
12 ing that she was not the widow of the decedent was given to the defendants in error and their attorneys by the attorney of the plaintiff in error. That when said letter was received by Mr. Harlock, plaintiff in error immediately requested defendants in error to consent to vacate the decree of the Surrogate of March 8th, 1897, adjudging that plaintiff in error was not the widow of the decedent, Edward C. Kimball, but defendants in error refused to so consent. Being advised by her counsel that the adjudication of said Surrogate that plaintiff in error was not the widow of said decedent might be binding and conclusive and *res adjudicata* in all proceedings, suits or actions brought thereafter by plaintiff in error to enforce her

rights as widow unless reversed on appeal, plaintiff in 13
error appealed from the decree of the Surrogate aforesaid to the Supreme Court of the State of New York. After such appeal was taken counsel for defendants in error stated to counsel for plaintiff in error that they would move to dismiss the appeal upon the same grounds now taken by them to dismiss the writ of error, whereupon they were again requested to consent to vacate the decree of the Surrogate appealed from, but they refused.

Upon the representation to counsel for the defendants in error by counsel for plaintiff in error that such decree might be *res adjudicata* as to the widowhood of plaintiff in error and might be binding upon her in a suit for dower 14
in the real estate of decedent, or in other proceedings, as, for example, a proceeding by plaintiff in error to revoke the probate of the will made without notice to her, defendants in error refrained from any attempt to dismiss the appeal on the ground of the probate of the alleged will and revocation of the letters of administration, and continued to litigate the question of widowhood in the proceedings now brought to this Honorable Court by writ of error. Accordingly no such motion to dismiss was made, but the appeal was argued in due course, and after hearing both sides on the merits the decree of the Surrogate was affirmed, with costs. Whereupon a decree of affirmance on said appeal and for ninety-eight and 32/100 dol- 15
lars costs was entered against plaintiff in error, which judgment or decree still stands unreversed and unsatisfied, and the defendants in error have never offered, and do not offer on this motion, to release plaintiff in error from said costs, decreed as aforesaid. The printed record, at pages 67 and 68, contains the decree of affirmance, with costs.

VIII.—That thereafter an appeal was duly taken from said decree of affirmance to the Court of Appeals of the State of New York. That the defendants in error made no motion to dismiss such appeal, but appeared and were heard on said appeal upon the merits, and the Court of

16 Appeals affirmed the decree appealed from with costs; whereupon the defendants in error caused to be entered in the Surrogate's Court a decree of affirmance upon the remittitur from the Court of Appeals with one hundred and eleven and 05/100 dollars costs against plaintiff in error. (Printed Record, p. 75.) That such decree still stands unreversed and unsatisfied and defendants in error have never offered to remit or release said costs against plaintiff in error, which costs, together with the costs previously entered as aforesaid against plaintiff in error, amount to the sum of two hundred and nine and 37/100 dollars.

17 IX.—That said decedent died seized of certain real estate, as alleged in the petition to dismiss the writ of error, and also possessed of certain personal property not exceeding two thousand dollars in value. That said decedent was at the time of his death a member in good standing of the Consolidated Stock and Petroleum Exchange of New York, and was a participant in the so-called "Gratuity Fund," and a member of the Gratuity Fund Association of said Exchange, and had duly paid all dues and assessments as such member and participant. That said Exchange agreed with said decedent in his lifetime in consideration of payments of dues and assessments as
18 aforesaid as follows, to wit: "The Trustees of the said "Gratuity Fund shall within one year after proof of "death of any member participating in said Fund pay "out of the money so collected the sum of eight thou- "sand dollars. Should a member participating in said "Fund die leaving a widow and no children, the whole "sum shall be paid to such widow for her own use. "Should a member participating in said Fund die, leav- "ing neither widow or children, then the whole sum shall "be paid to the next of kin of the deceased, as such next "of kin shall be defined by the law of the State of New "York. In all cases a certified copy of the proceedings, "before a Surrogate or Judge of Probate, may be ac-

"cepted as proof of the matters therein contained, and if 19
"accepted, shall protect the Association in acting
"thereon, and the Association shall forever be released
"from all further claims or liability whatsoever." That
the sum of eight thousand dollars due and payable as
aforesaid has been collected by said Consolidated Ex-
change, and said Exchange now holds the same awaiting
the final determination of the rights of plaintiff in error
and defendants in error thereto. That unless this Honor-
able Court takes cognizance of the matter in issue, and de-
nies the present motion to dismiss the writ of error, the
said Exchange may, pursuant to the provisions above
cited, accept a certified copy of the decree adjudicating 20
plaintiff in error not to be the widow of decedent, and
pay over the sum of eight thousand dollars aforesaid to
the defendants in error, and claim to be protected from all
further claims respecting the same.

X.—The Federal questions involved are shown by the Assignment of Errors at page 79 of the Printed Record; those questions resolve themselves into the following: Did the Courts of New York give full faith and credit to the decree of the Court of the State of North Dakota, declaring that both parties appeared, and adjudicating them divorced?

21

WHEREFORE, the plaintiff in error prays that the motion to dismiss the writ of error, and for affirmance of the decree of the Court of Appeals of the State of New York, be denied, with costs.

Dated New York, April 4th, 1898.

MAUDE E. KIMBALL.

WALDEGRAVE HARLOCK,
Attorney for Plaintiff in Error.

22 STATE OF NEW YORK, }
City and County of New York, } ss.:

MAUDE E. KIMBALL, being duly sworn, deposes and says: That she has heard read the foregoing answer subscribed by her and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

MAUDE E. KIMBALL.

Sworn to before me this 4th }
day of April, 1898. }

F. W. LONGFELLOW,

23 [SEAL.] Notary Public (68),
New York County, N. Y.

STATE OF NEW YORK, }
County of New York, } ss.:

I, WILLIAM SOHMER, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify that F. W. Longfellow, before whom the annexed deposition was taken, was at the time of taking the same a Notary Public of New York, dwelling in said County, duly ap-
24 pointed and sworn, and authorized to administer oaths to be used in any Court in said State, and for general purposes; that I am well acquainted with the handwriting of said Notary, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County the 5th day of April, 1898.

WM. SOHMER,
Clerk.

SUPREME COURT OF THE UNITED STATES. 25

MAUDE E. KIMBALL,
Plaintiff in Error,

against

HARRIET A. KIMBALL, HARRIET I. JAMES and JOHN S. JAMES,
Defendants in Error.

No. 594.
Affidavit in Support of Answer.

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
City and County of New York } ss: 26

WALDEGRAVE HARLOCK, being first duly sworn, deposes and says, as follows:

I am an attorney and counsellor at law, having my office in the City of New York. I am attorney for the plaintiff in error herein, and was her attorney in all the proceedings in the Surrogate's Court of Kings County set forth in the printed record herein. I have read the answer of plaintiff in error to the petition to dismiss the writ of error herein, which answer is verified April 4th, 1898, and know the contents thereof, and the allegations therein are true to my knowledge. The facts regarding 27 the finding and probate of an alleged will of the deceased since the Surrogate's decree relied upon to dismiss the writ of error do not appear in the printed transcript of the record herein, and were not brought to the attention of the Courts of New York in any manner. After the decree of the Surrogate now sought to be reversed in this Court and as soon as I was informed by Messrs. Arnold & Green, attorneys for defendants in error, of the finding of an alleged will of the decedent, Edward C. Kimball, and of the *ex parte* probate thereof, I stated to Lemuel H. Arnold, Esq., of Arnold & Green, that I would, if they did not oppose, or with their consent, ask the Surrogate to vacate the decree

28 adjudging that plaintiff in error was not the widow of said decedent, and that I would thereupon bring an action on behalf of plaintiff in error against the Consolidated Stock and Petroleum Exchange of New York to recover the sum of eight thousand dollars held by said Exchange *and ready to be paid by it to the widow* of said Edward C. Kimball, if he left one, or to the defendants in error, as next of kin, if decedent left no widow, to which action defendants in error should be parties and wherein the rights of all interested could be determined. Mr. Arnold refused to consent to or not to oppose the revocation of the Surrogate's decree aforesaid, and fearing that in any
29 action brought by plaintiff in error such decree would be used as a prior adjudication that plaintiff in error was not the widow of decedent, I was compelled to and did appeal from such decree. Mr. Arnold thereupon intimated to me that he would move to dismiss the appeal on the ground that the discovery and probate of a will rendered the proceedings for letters of administration useless, but I urged upon him the danger to my client from the adjudication of the Surrogate which he had refused to consent to vacate, whereupon he refrained from moving to dismiss the appeal. From that time said attorneys for defendants in error actively promoted the appeal and argued said ap-
30 peal on the merits and without in any way calling the attention of the Court to the probate proceedings or the alleged effect thereof. In and by their printed brief on the appeal to the Supreme Court of New York the said attorneys for defendants in error made the following points —as their first three points—which I quote from their said brief, to wit:

" POINTS.

I.

If the appellant is not the lawful widow of Kimball, then it follows that she is not entitled to letters of administration on his estate, and has no standing

in court to attack the letters of administration granted by the Surrogate's Court to the respondents Harriet A. Kimball and John S. James. 31

II.

The appellant is not the lawful widow of Kimball, if, when she entered into the ceremony of marriage with him, she had not been divorced from Semon.

III.

That she had not been lawfully divorced from Semon conclusively appears. The judgment roll in the divorce action shows that Semon was served with the summons in the State of New York, and that he did not appear in said action nor plead therein. He was never a resident of nor domiciled in North Dakota, but resided in this State. It is perfectly well settled that a judgment of divorce such as was granted to the petitioner in the action above referred to was null and void, because the Court did not have jurisdiction to grant the divorce, and that such a judgment may be impeached collaterally for want of jurisdiction in the Courts of this State." 32

Upon the affirmance of the decree by the Supreme Court, I instituted an appeal to the Court of Appeals; whereupon said attorneys for defendants in error took steps to get said appeal heard as a preferred cause, and they themselves caused the appeal to be placed upon the calendar for the hearing of "appeals from final orders in special proceedings," which, under the rules of the Court of Appeals of the State of New York are entitled to early hearing. In said Court of Appeals the appeal was argued by both sides on the merits, and no motion to dismiss on the grounds aforesaid was made in said Court, and the attention of that Court was in no manner called by either side to the alleged will and probate thereof or to the alleged effect thereof. 33

34 Although, without notice to plaintiff in error or to me, the Surrogate has revoked the letters of administration issued to the defendants in error, the decree denying the petition of plaintiff in error for the issue of letters of administration to her has never been revoked. That decree finds as a basis for denying the prayer of the plaintiff in error that she is not the widow of the decedent. It is this finding and decree which defendants in error and their counsel have steadily refused to allow to be cancelled and which stands as an adjudication that plaintiff in error is not the widow of decedent, and which decree she can only be relieved from by this Honorable Court by this writ of error.

35 The moneys payable to the widow or next of kin, as the case may be, by the Exchange aforesaid are in effect proceeds of a life insurance contract. In any suit brought by plaintiff in error to recover that money as widow the Exchange would pay the money into Court and interplead the defendants in error, leaving the rival claimants to litigate the question of their rights thereto, said Exchange having no further interest in the litigation. In such litigation I verily believe that the decree of the Surrogate adjudging plaintiff in error not to be the widow of decedent would be relied upon by defendants in error as a prior adjudication to defeat plaintiff in error. Judgments for

36 costs of the proceedings, in the Courts of the State of New York, aggregating two hundred and nine and 37/100 dollars, have been entered against the plaintiff in error, and the same stand unsatisfied of record, nor have defendants in error or their attorneys ever offered to remit or release the same.

Even if the defendants in error should now consent to the cancellation of the Surrogate's decree and the judgments of affirmance, which, however, they have not offered to do on this motion or otherwise, nevertheless any suit brought by plaintiff in error to assert her rights to said insurance money or her dower in real estate of decedent will involve the question of the effect of the North Dakota

divorce. By reason of the decisions of the Courts in this present proceeding the plaintiff in error would be defeated in every court of the State of New York and would finally be obliged to come to this Court by writ of error after thus needlessly going for a second time through the State Courts. 37

It is, therefore, respectfully submitted that the writ of error herein be not dismissed.

WALDEGRAVE HARLOCK.

Subscribed and sworn to before me this 4th day of April, 1898.

F. W. LONGFELLOW,
[SEAL.] Notary Public (68), 38
New York County, N.Y.

STATE OF NEW YORK, County of New York. } ss.:

I, WILLIAM SOHMER, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify that F. W. Longfellow, before whom the annexed deposition was taken, was, at the time of taking the same, a Notary Public of New York, dwelling in said County, duly appointed and sworn, and authorized to administer oaths to be used in any Court in said State, and for general purposes; that I am well acquainted with the handwriting of said Notary, and that his signature thereto is genuine, as I verily believe. 39

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 5th day of Apl., 1898.

WM. SOHMER,
Clerk.